capable of looking after herself; she would not be able to do normal household duties; nor behave like an ordinary housewife. In his opinion, the patient needed hospital attention for several years.

The views expressed by Dr. Choudhury were substantially corroborated by the guardian *ad litem*

On the medical evidence adduced before the court, I am satisfied that the petitioner had proved that the respondent was insane and has been as insane for at least three years immediately preceding the filing of this petition.

After hearing the petitioner as well as the guardian *ad litem*, I am also satisfied that the respondent had no valid defence to this charge. Lastly I am satisfied that this petition was not presented in collusion with the respondent or her guardian *ad litem*.

In his evidence, the guardian *ad litem* asked that the custody of the issue of the marriage be awarded to the respondent. His reason for asking for it was that since the respondent is the mother, she should have the children.

In determining whether the father or the mother should have custody of the children of the marriage, the paramount consideration is the interest of the children. Generally speaking, young children are best looked after by their mothers. Clearly this cannot apply in this case as the mother is even unable to look after herself properly. In this case, I think custody of the two sons should be given to the father subject to this condition, that the respondent shall have reasonable access to them at least once a month when she recovers from her mental sickness.

Sub-section (3) of section 6 reads: —

"If the court is satisfied....

(a) that any of the grounds set out in sub-section (1) have been proved and that no defence is admissible,

the court shall grant a decree of dissolution of marriage;

(b) that circumstances have arisen which in the opinion of the court make it reasonable and just that the marriage should be dissolved,

the court may grant a decree of dissolution of marriage on such terms as may be just, and subject to such conditions as the court may think fit to attach."

It seems to me that the proviso attached to sub-section (3) appears to give to the court a wide and absolute discretion. Of course, like other judicial discretion, it must be exercised in the interest of justice and not capriciously. The question is whether I should exercise the discretion in this case. The meagre evidence produced showed that the respondent would be completely destitute unless provision is made for her maintenance by the petitioner. Her father's financial position would seem to be unable to sustain her indefinitely. It is quite clear that the respondent must be supported for some time. Under the present mental condition, I am satisfied that the respondent is not able to earn her living. I am also satisfied that her father is unable to maintain her for long. I think it is right and fair that the petitioner should be asked to provide a small maintenance for her. It is difficult to determine what is the proper allowance to award but my task was made easier by the petitioner agreeing to pay the sum of $30 per month. This happened to be the figure mentioned by the father of the respondent. Taking all the facts into consideration, it seems to me to be a reasonable sum.

In my judgment, I hold that the petitioner is entitled to a dissolution on the ground of insanity and I pronounce a decree *nisi* accordingly. I direct that the decree *nisi* be not made absolute within three months from date hereof.

I award to the petitioner the custody of the two sons of the marriage subject to this condition, that the respondent shall have reasonable access to them at least once a month when she recovers from her mental illness.

In the exercise of my discretion, I further order that the petitioner shall pay $30 (dollars thirty only) maintenance each month to the respondent commencing on September 30, 1971 and thereafter on the last working day of every successive month; with liberty to apply to vary or revoke the said maintenance order. I direct that payment shall be made into court to the credit of Ling Soon Hong, the guardian *ad litem*.

As regards costs and in the exercise of my judicial discretion, I order that each party pays his own costs.

Petition granted.

ASSOCIATED FINANCE CORPORATION LTD.

v. POOMANI

[O.C.J. (Pawan Ahmad J.) August 27, 1971]

[Ipoh — Originating Summons No. 723 of 1968]

Moneylenders — Charge — Security for loan — Failure to comply with Moneylenders Ordinance, 1951, ss. 3, 16, 19 & 21.

Land Laws — Charge — Repayment of principal and interest — Failure of — National Land Code, ss. 256 & 257.

The applicants were moneylenders and the respondent was the registered owner of a piece of land in Ipoh. Her house being about to be foreclosed by a building society, she arranged for a loan by the applicant who paid off the building society $7000 and in turn had her execute a charge over her said land to themselves as security for the loan with interest. The charge was duly registered. The respondent failing to repay the loan according to the terms of the agreement, the applicant sought an order to sell the property pursuant to the provisions of the National Land Code. The respondent raised numerous objections which at the trial were narrowed down to issues of non-compliance with the Moneylenders Ordinance, 1951.

Held: on the evidence the applicants failed to comply with several provisions of the Moneylenders Ordinance. Therefore the agreement was unenforceable, and the application dismissed.

Cases referred to:-

(1) *Boor Singh* v. *Abdul Majeed* [1967] 1 M.L.J. 16.

(2) *Gaskell Ltd.* v. *Askwith* (1928-29) 45 T.L.R. 566.

(3) *Kannappa Chettiar* v. *Scully & Anor.* [1962] M.L.J. 148.

(4) *Ramasamy Chettiar* v. *Wong Poh Fatt* [1960] M.L.J. 43.

ORIGINATING SUMMONS.

W. S. W. Davidson for the applicants.

J. R. Devadas for the respondent.

Cur. Adv. Vult.

Pawan Ahmad J.: The applicants are a finance company carrying on the business of moneylending under the style of "Associated Finance Corporation Ltd.," at premises No. 7-9 Station Road, Ipoh. The respondent is the registered owner of land held under certificate of title No. 29348 for lot 3713N, town of Ipoh.

By an agreement dated 2nd October, 1967 (P.3), the applicants stated that the respondent executed a charge over her said land to the applicants as security for the loan of $7,000 with interest and the said charge was duly registered on 17th October, 1967. It was a term of the charge that the principal sum shall be repaid on or before 6th March, 1968. The applicants alleged that on 20th June, 1968, the principal sum still remained unpaid together with 3 months' arrears of interest.

Subsequently the applicants stated that a notice in Form 16D under section 254 of the National Land Code was served on the respondent on 24th June, 1968. Then on 2nd September, 1968, the respondent paid a sum of $350 in respect of interest for the period 5th March, 1968 to 5th August, 1968 but still failed to repay the principal sum. The applicants now seek for an order of sale of the property charged pursuant to sections 256 and 257 of the National Land Code.

The respondent raised numerous objections to the claims made by the applicants and contended that the agreement is not enforceable at law for non-compliance with the requirements of sections 16, 19 and 21 of the Moneylenders Ordinance, 1951. At the trial the parties by consent, however, narrowed down the issues for the determination of the court to the following:

1. Was an authenticated copy of the memorandum of agreement and a copy of the charge handed to the respondent or her agent before the security was given or the money lent?
2. Does the difference in the date stated in paragraph 1 of the memorandum of agreement (6.9.67) and the date of execution thereof (2.10.67) render the said agreement unenforceable?
3. Is there any difference between the terms of the memorandum of agreement and the terms of the charge, and, if so, does the same render the charge unenforceable?
4. Does the fact that the $7,000 was paid to the Malaya Borneo Building Society Ltd. on behalf of the respondent in repayment of a previous loan, and not handed to the respondent in cash or by cheque render the said agreement unenforceable?
5. If not, does the fact that these circumstances have not been set out in the memorandum of agreement render the said agreement unenforceable?
6. Does the statement of account marked "E.S.M.3" attached to the affidavit of Mr. E.S. Muthu comply with the provisions of clauses 19 and 21 of the Moneylenders Ordinance, 1951, and if not, what is the effect in law?
7. Does the fact that interest has been charged from 6.9.67 and not 2.10.67 render the agreement unenforceable?

The managing director of the applicant company (PW1) *inter alia* stated that the respondent's husband (DW2) approached him sometime in August 1957 for a loan to settle with the Malaya Borneo Building Society Ltd. because the respondent's house was about to be foreclosed by the Malaya Borneo Building Society Ltd. PW1 agreed to grant the loan and so in furtherance of it the applicant company on 4th September, 1967, forwarded a cheque for $7,000 in favour of Messrs. Gibb & Co., their solicitors, with instructions to make the necessary arrangements for payment. Messrs. Gibb & Co., then in turn communicated with Messrs. Khong & Son, the solicitors for the Malaya Borneo Building Society Ltd., and eventually by letter dated 6th September, 1967, (P5) forwarded the said cheque for $7,000 to them subject to an undertaking that they (Khong & Son) would release the money only after the discharge of the existing charge and registration of a fresh charge in favour of the applicant company had been completed.

The respondent executed both the memorandum of agreement (P 3) and the fresh charge in favour of the applicant company on 2nd October, 1967. Messrs. Khong & Son however released the said sum of $7,000 to Malaya Borneo Building Society Ltd., only on 11th October, 1967. Since Messrs. Khong & Son were acting for Malaya Borneo Building Society Ltd., in my view they could not also be acting on behalf of the respondent in the same transaction. In the circumstances, I find that the money was lent only after the security was given.

The respondent denied that a copy of the memorandum of agreement and a copy of the charge were handed to her or to her agent. PW 2, the chief clerk of Messrs. Khong & Son, however stated that a copy of P3 and a copy of the charge were given over to the respondent in the presence of her husband and the respondent made the acknowledgment on P3. However, in the course of the trial while cross-examining PW1, the defence put in a copy of P3 *viz.* D4. If the respondent did not receive a copy of P3 and a copy of the charge, it is surprising how the defence was able to produce D 4 at the trial. On the balance of probabilities on this matter I am inclined to believe the applicants' version and I therefore find that a copy of P3 and a copy of the charge were given to the respondent before the security was given and before the money was lent.

Be that as it may, the most important matter raised in the first issue, I believe, is whether or not the memorandum of agreement of repayment given to the respondent was authenticated. Mr. Davidson submitted that once the applicants had indirectly established that it had been done by the respondent's acknowledgment

as shown at page 3 of P3 then the burden of proving it otherwise would fall on the respondent. I fully accept counsel's submission on this point and it therefore falls on the respondent to rebut this presumption. This has been held in the case of *Boor Singh* v. *Abdul Majeed*.[1] Further, it was alleged by the applicants that PW2 explained the contents of P3 including the acknowledgment to the respondent before she signed it. The respondent admitted that she did sign the acknowledgment in P3 but she said that she did not know what it meant at that time because she is illiterate and the contents were never explained to her. The court has in the present case however the opportunity of scrutinising both P3 and D4 and I am satisfid that the authentication by the applicant company or their agent as required by section 16(1) of the Moneylenders Ordinance, 1951, is nowhere to be found in either of these two documents. I am therefore satisfied that in fact no authenticated copy of the memorandum of agreement of repayment was ever given by the applicants or their agent to the respondent at any time contrary to section 16(1) of the Moneylenders Ordinance, 1951.

Next, P3 was executed by both parties on 2nd October, 1967. Clause 1 of P3 however states that the loan was given on 6th September, 1967, but counsel for the applicants wanted the court to read the words "to lend" in the aforesaid clause as "to deposit" in view of the peculiar circumstances of the present case. If clause 1 of P3 is to be read as suggested by Mr. Davidson then it is apparent that P3 has failed to give the date of the loan. On the other hand, if the said clause is to be read as it stands then 6th September, 1967, is the date when the loan was supposed to have been given. However, from the evidence it is clear that the money was only released by Messrs. Khong & Son on 11th October, 1967 The date 6th September, 1967, is therefore not the date when the money was lent. P3 therefore does not either contain the date of the loan or that the date in it is incorrect. On the second issue the applicants have therefore contravened the requirement of section 16(3) of the Moneylenders Ordinance, 1951, which reads as follows:

"16(3). The note or memorandum aforesaid shall contain all the terms of the contract and in particular shall show separately and distinctly —

(a) the date of the loan;

...."

A mistake in the memorandum of agreement of repayment as in the present case would render the contract unenforceable. (*Gaskell, Ltd.* v. *Askwith*[2]).

The third issue was abandoned by Mr. Devadas and it was also not taken up by Mr. Davidson and I therefore do not propose to deal with it at all.

The third and fourth issues can conveniently be disposed off together. In this connection it was agreed by both parties that the money was paid in respect of the respondent's previous loan with the Malaya Borneo Building Society Ltd. The cheque was never handed to the respondent but it was paid direct by Messrs. Khong & Son to the Malaya Borneo Building Society Ltd. Such a method of payment in my view does not make the contract unenforceable because the payment was made in the manner agreed to by the respondent. (*Kannappa Chettiar* v. *Scully & Anor.*[3]). The failure to include the terms or circumstances is another matter. Such a failure would obviously contravene the provision of sub-section (3) of section 16 of the Moneylenders Ordinance, 1951, which reads:

"16.(3). The note or memorandum aforesaid shall contain all the terms of the contract...."

PW1 himself admitted in cross-examination that:

"it was one of the terms of the contract that the loan was to be paid to the Malaya Borneo Building Society Ltd. in order that the society may be released and the property charged to the applicant company."

It is also clear from the evidence that this condition was carried out when payment was made. This term of the contract had however not been incorporated in P3 and therefore the contract is again unenforceable.

The sixth issue is in reference to section 21(1) of the Moneylenders Ordinance, 1951, which states:

"21.(1) Where proceedings are taken in any court by a moneylender for the recovery of money lent ... he shall produce a statement of account as prescribed in section 19 of this Ordinance."

Section 19(1) requires the following particulars to be disclosed in the statement, namely:

(a) the date on which the loan was made, the amount of the principal of the loan and the rate *per centum per annum* or the amount of interest charged;

(b) the amount of any payment already received by the moneylender in respect of the loan and the date on which it was made; and

(c) the amount of all sums due to the moneylender for principal but unpaid and the dates upon which they became due and the amount of interest due and unpaid in respect of each such sum; and

(d) the amount of every sum not yet due which remains outstanding and the date upon which it will become due.

It is further stated therein that the statement of account given in the form in the First Schedule to the Ordinance shall be deemed to be sufficient. Upon examination of the statement of account attached to the summons it is apparent that it contains only particulars of two of the four tables set out in the First Schedule *viz.* Table II and Table III. The applicants need not have to set out the particulars in four tables but in whatever number of tables they set out the particulars the tables must contain all the particulars mentioned in section 19(1) (a), (b), (c) and (d). In the present case the applicants have failed to set out the date on which the loan was made as required by section 19(1)(a) in any of the two given tables and this failure to comply with the requirement of section 21(1) read with 19(1) of the said Ordinance is an irregularity which cannot be waived. (*Ramasamy Chettiar* v. *Wong Poh Fatt*[4]).

As to the seventh and last issue the applicants were claiming interest from 6th September, 1967, —

the date the applicants' solicitors released the cheque to Messrs. Khong & Son the solicitors for the Malaya Borneo Building Society Ltd. This fact was clearly stated by PW1 the managing director of the applicant company in cross-examination. Even though the memorandum of agreement of repayment was executed on 2nd October, 1967, the money was however only released by Messrs. Khong & Son on 11th October, 1967, which date I assume to be the true date when the money was lent to the respondent. That being so, the applicant company would appear to be claiming interest from a date even before the money was lent and this is highly irregular and this defect cannot be waived.

It is now apparent that the applicants have failed to comply with several provisions of the Moneylenders Ordinance, 1951, and their failure to do so would render the contract unenforceable. The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Lewis & Co.; J. R. Devadas.*

YEE YA MANG v. PUBLIC PROSECUTOR

[A. Cr. J. (Sharma J.) November 25, 1971]

[Muar — Criminal Appeal No. 47 of 1970]

Arms and Explosives — Charge — Possession of arms and ammunition — Meaning of "possession" — Arms Act, 1960, s. 9(a).

Evidence — Confession made by appellant in the course of police investigation — Whether admissible — Evidence Ordinance, 1950, ss. 25 and 27.

The appellant was charged under section 9(a) of the Arms Act, 1960 for having in his possession a pistol and three rounds of ammunition, without an arms licence or an arms permit. The pistol and the three rounds of ammunition were not found in the house occupied by the appellant but at a spot in a rubber estate pointed out by the appellant. In the course of police investigation the appellant said that he had a revolver. Subsequently he took the police officer to the spot where the revolver was found. The spot pointed out by the appellant was a pit, covered by pieces of wood, underneath which was found a plastic bag. Inside this plastic bag was a stocking containing the subject matter of the charge. About an hour earlier the appellant had taken the police to a different spot in another rubber estate from where a toy pistol was recovered.

Held: (1) the confession made by the appellant was inadmissible under section 25 of the Evidence Ordinance as there was no evidence to show that the police officer to whom it was made was not below the rank of inspector, and it was not admissible under section 27 of the Evidence Ordinance as the possession of the revolver was not discovered in consequence of the information given by the appellant and further did not distinctly relate to the facts discovered in consequence of such information;

(2) the appellant gave an explanation as to how he came to know where the revolver was lying hidden. The knowledge of the place where the revolver was lying hidden did not necessarily constitute possession by the appellant unless there was further evidence produced by the prosecution that it was the appellant who had hidden it there. In the circumstances, the appeal must be allowed and the conviction quashed.

Per Sharma J.: "The word 'possession' implies a physical capacity to deal with the thing as one likes to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having 'possession', that he not only has such dominion, but also that he can exercise it. In the present case, if, for example, the accused had gone alone to the spot in question and took out the loaded pistol from the place of concealment, the loaded pistol could be said to be in the possession of the appellant as it lends support to the conclusion that it was within his exclusive knowledge as to where this pistol was kept concealed in the rubber estate... In the absence of any incriminating statement made by the accused leading to the discovery of the articles, their production alone from another man's land cannot be sufficient to establish the accused's possession. It may at the most show his knowledge that the articles were concealed there. It is the prosecution that has to establish accused's possession apart from his knowledge."

Observations on the provisions of section 27 of the Evidence Ordinance 1950 as regards how much information received from the accused may be proved.

Cases referred to:-

(1) *Emperor* v. *Chokhey* A.I.R. 1937 All. 497.

(2) *Trimbak* v. *State of Madhya Pradesh* A.I.R. 1954 S.C. 39.

(3) *Naurang Singh* v. *Emperor* A.I.R. 1927 Lah. 900.

(4) *Khuda Baksh* v. *King Emperor* A.I.R. 1923 Lah. 238.

(5) *Pulukuri Kottaya & Ors.* v. *Emperor* A.I.R. 1947 P.C. 62.

(6) *Ramkishan Mithanlal Sharma & Ors.* v. *State of Bombay* A.I.R. 1955 S.C. 104.

(7) *Karam Din* v. *Emperor* A.I.R. 1929 Lah. 338.

MAGISTRATE'S CRIMINAL APPEAL.

Elyas Majeed for the appellant.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Sharma J.: The appellant was charged under section 9(a) of the Arms Act 1960 for having in his possession a pistol and three rounds of ammunition without an arms licence or an arms permit. The pistol and the three rounds of ammunition were not found in the house occupied by the accused but at a spot in a rubber estate pointed out by the accused. The spot pointed out by the accused was a pit 4 feet long, 3 feet wide and 2½ feet deep. This pit was covered by two or three pieces of wood which were removed by the police and in the pit underneath those pieces of wood was found a plastic bag. Inside this plastic bag was a stocking containing the revolver loaded with the three rounds of ammunition, the subject matter of the charge. A piece of cloth had been wrapped round that revolver. About an hour earlier the accused had taken the police to a different spot in another rubber estate from where a toy pistol was recovered.

The word "possession" implies a physical capacity to deal with the thing as one likes to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having "possession" that he not only has such dominion but also that he can exercise it. In the present case if, for example, the accused had gone *alone* to the spot in